A

TOH HONG CHENG

v.

BUMIPUTRA-COMMERCE BANK BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN YUNUS J
[CIVIL SUIT NO: S2-23-50-2001]
20 APRIL 2006

C ***CIVIL PROCEDURE:*** *Trial - Conduct of proceedings - Appeal against assessment of damages - Whether trial judge did not hold a proper trial before arriving at his finding of liability - Whether registrar's decision on assessment of damages speculative in nature - Whether both proceedings fundamentally flawed - Exercise of court's powers - Rules of the High* D *Court 1980, O. 92 r. 4*

CIVIL PROCEDURE: *Damages - Assessment of damages - Appeal against - Whether trial judge did not hold a proper trial before arriving at his finding of liability - Whether registrar's decision on assessment of damages speculative in nature - Whether both proceedings fundamentally* E *flawed - Exercise of court's powers - Rules of the High Court 1980, O. 92 r. 4*

This was an appeal by the plaintiff against the decision of the senior assistant registrar ('registrar') on assessment of damages, F pursuant to an order by the trial judge ('judge') after a finding of liability had been made at the 'alleged' trial by the judge. The judge did not give any grounds for his decision, and there was nothing in the minutes as recorded to show which rule of procedure he adopted when he held the 'trial' in the manner that G he did.

Held (setting aside the orders of both the trial judge and the registrar):

H **(1)** After consideration of the written submissions of both sides, this appeal should neither be allowed nor dismissed. Instead, with the view of preventing injustice, this court exercised its powers under O. 92 r. 4 of the Rules of the High Court 1980 ('RHC') to set aside the order of the judge as well as I the order of the registrar; and ordered the plaintiff to file Form 63 pursuant to O. 34 of the RHC for case management with a view to have this case ready for a proper trial. The reasons for doing so were, on the facts, as follows: (i) the

judge, in making a finding of liability in favour of the plaintiff, did not hold a proper trial before arriving at his finding; (ii) the issue posed by the judge before the parties was not clear; (iii) the judge was not clear on his finding of liability; (iv) in view of the absence of a proper finding of liability by the judge, the decision of the registrar on the assessment of damages must necessarily be speculative in nature; and (v) both proceedings before the judge and the registrar were fundamentally flawed rendering it legally impossible for a decision on this appeal to be made. (paras 2, 3, 4, 12, 14, 22 & 23)

[Order accordingly.]

Legislation referred to:
Rules of the High Court 1980, O. 33 rr. 2, 5, O. 34, O. 35A, O. 38 rr. 1, 2, O. 92 r. 4

For the plaintiff - Yee Teck Fah; M/s Yee Teck Fah & Co
For the defendant - Jasvinder Kaur; M/s Azim, Tunku Farik & Wong

Reported by Suresh Nathan

JUDGMENT

Hishamudin Yunus J:

[1] Enclosure 28 is an appeal by the plaintiff against the decision of the learned senior assistant registrar ('the registrar') on assessment of damages. The decision was given on 2 December 2004. The plaintiff is dissatisfied with the award. I will deal with the nature of the award in due course.

[2] In hearing this appeal, after considering the written submissions of both sides, I neither allowed the appeal nor dismissed the same. Instead, with the view to prevent injustice, I exercised my powers under O. 92 r. 4 of the Rules of the High Court 1980 to set aside the order of the learned judge as well as the order of the registrar; and ordered the plaintiff to file Form 63 pursuant to O. 34 of the Rules of the High Court 1980 for case management with a view to have this case ready for a proper trial.

[3] I did so for the following reasons.

[4] Firstly, the learned judge, in making a finding of liability in favour of the plaintiff did not hold a proper trial before arriving at his finding. At the 'trial' in open court on 30 October 2002 before the trial judge no witnesses were called and no evidence was recorded. The learned judge only directed counsel for both sides to make oral submissions before him. And both counsel made brief submissions. At the end of the submissions he proceeded to make a finding of liability, followed by an order that damages be assessed by the registrar. What actually transpired at the hearing before the learned judge can be seen from the minutes in the case file, and it is as follows:

> Coram: Y.A. Tuan Hakim Dato' Azmel Bin Haji Maamor
>
> Encik Yee Teck Fah bersama Cik Ong Gek Lin bagi pihak plaintif
>
> Encik Wong Hok Mun bagi pihak defendan
>
> Kandungan 1
>
> Isu liability sahaja.
>
> Untuk satu isu sahaja.
>
> Sama ada defendan melewatkan akaun plaintif 16 hari salah atau tidak?
>
> Peguam plaintif berkata defendan tidak memberi apa-apa alasan di atas kelewatan itu. Oleh itu pohon perintah seperti dipohon dan gantirugi ditaksir oleh SAR.
>
> Peguam defendan: Reasons for the delay.
>
> This took place during the merger between BOC and BBMB. The Kuantan branch did not share the same computer platform with the Ampang branch which was formerly Bank of Commerce.
>
> Mahkamah: Defendant failed to give reasonable explanation for the delay. The defendant is liable. Costs for the plaintiff. Damages to be assessed by the SAR.

[5] When I asked the counsel for both sides to enlighten me as to the procedure adopted by the learned judge in not holding the ordinary mode of trial before calling for submissions, both counsel could only informed me that the 'trial' took place during the days of the 'fast track system', and they proceeded in the manner as shown in the minutes because they only did what was directed by the trial judge. When I asked both counsel further whether any

of them had made any application (be it oral or written) before the trial judge for the trial to proceed in accordance with O. 33 r. 2 of the Rules of the High Court, they answered in the negative.

[6] The trial judge, unfortunately, did not give any grounds for his decision. There is nothing in the minutes as recorded to show which rule of procedure was adopted by the learned judge when he held the trial in the manner that he did.

[7] Now, reverting to the present appeal, the hearing of this appeal commenced on 24 May 2005. On that day I directed parties to file their respective written submission. After reading the submissions and the record of proceedings both before the learned judge and the registrar, for the reasons that I have lamented a moment ago in this judgment, I felt troubled by the procedure adopted by the learned judge at the trial before him and by the order that he made regarding the issue of liability (I was also troubled by the decision of the registrar – but I will deal with his order later). Accordingly, at the second hearing date of this appeal, that is, on 29 August 2005, I directed the plaintiff's/appellant's counsel to write to the Secretary of the learned judge for the notes of the proceedings as recorded by the judge in his notebook, just in case what was recorded in the judge's notebook was more elaborate than what is recorded in the minutes in the case file. However, on 13 March 2006, at the continued hearing of this appeal, the counsel for the plaintiff reported to me that he had written to the Secretary of the learned judge, as directed by me, but unfortunately did not get any response. Hence, in order to know what actually transpired at the hearing on 30 October 2002, I had no choice but to rely solely on the notes/minutes as recorded in the case file.

[8] In my judgment, with respect, the procedure adopted by the learned trial judge was highly irregular as to render the whole trial a nullity. As a general rule a trial must be conducted in accordance with O. 38 of the Rules of the High Court (read with O. 35A, which relates to witness statements). Witnesses must be called to read out their witness statements and be examined orally (cross-examination, re-examination and questioned by the trial judge). This has always been the practice and procedure since the English rules of procedure were introduced to this country and statutorily enforced by the Civil Procedure Code (F.M.S.), Rules of the

Supreme Court and now by the Rules of the High Court. And when the short-lived 'fast track system' was introduced in 2002/2003 there were no amendments made to the Rules of the High Court to implement the system. The system was found not to be working as expected and was soon abandoned.

[9] Now, O. 38 r. 1 reads:

> **1. General rule: Witnesses to be examined orally**
>
> Subject to the provisions of these rules and of the Evidence Act, 1950 and any other written law relating to evidence, any fact required to be proved at the trial of any action begun by writ by the evidence of witnesses shall be proved by the examination of the witnesses orally and in open court.

[10] It is, however, true that a trial judge has wide powers to determine the mode of trial as provided for, for instance, by O. 33 r. 2 or O. 33 r. 5 or O. 38 r. 2 of the Rules of the High Court and that in exceptional cases he may depart from the normal procedure as prescribed by O. 38 r. 1. But these are exceptional procedures and a judge must tread fairly and with care before adopting them.

[11] I do concede that, theoretically speaking, a court in exceptionally rare cases may dispose off a case merely by considering the agreed facts and the written submissions of parties. But in such a case as this, normally, the initiative would come from the parties themselves – and not from the judge. And the normal procedure is for the parties themselves to make a formal application setting out the salient agreed facts in full, the relevant documents in detail, and the issue (or issues) of law that they would like the judge to determine by way of submissions only. In the present case, however, one will note that the minutes in the case file do not show any oral application by either the plaintiff or the defendant on the day of the trial to invoke the exceptional procedures under O. 33. And neither do the minutes in the case file show that the learned trial judge had at the commencement of the trial intimated to the parties that he intended to invoke his powers under O. 33 r. 2 (or r. 5) to do away with the normal trial procedure of calling and examining witnesses, but to instead proceed merely by way of agreed facts and oral submissions, and had asked counsel of both sides their views as to whether they are agreeable to his proposal or not. Indeed, to repeat what I have pointed out earlier, when I asked counsel of both sides as

to whether any application under O. 33 r. 2 was made by any of them, they answered in the negative. The impression that I gather from the minutes in the case file and from both counsel themselves is that the initiative came from the learned trial judge himself who omitted to invite counsel of both sides to express their views as to whether or not they were agreeable as to the mode of trial the judge intended to adopt. Further, although the parties in their submissions had made reference to agreed facts, and that the sealed order of the judge dated 30 October 2002 at encl. 20 also mentioned 'Pernyataan Fakta-Fakta Yang Dipersetujui', yet when one examines the minutes in the case file for 30 October 2002 there is no record of the trial judge having alluded to any statement of agreed fact (or to any bundle of documents).

[12] Secondly, the issue posed by the learned trial judge before the parties is not clear. The issue posed by him, as can be seen from the notes/minutes in the case file, is:

> Sama ada defendan melewatkan akaun plaintif 16 hari salah atau tidak?

[13] This statement is crude and ambiguous. It is not appropriately framed. Indeed, it is meaningless. Thus, with respect, there is no proper formulation of the issue.

[14] Thirdly, the learned judge was also not clear on his finding of liability. Let us first examine the statement of claim. The relevant paragraphs of the statement of claim are as follows:

> 4. On or about 20/01/2001, Plaintiff caused a cheque no. 502452 ('SCB cheque') drew on Standard Chartered Bank Berhad for the sum RM100,000 payable to the plaintiff to be deposited with the Defendant.
>
> 5. The SCB cheque should be cleared within 2 days from 20/01/2001 or thereabout, and that the said sum of RM100,000 should have been credited into the Plaintiff's account, but in breach of the defendant's duty the SCB cheque was only cleared on or about 01/01/2001.
>
> 6. On or about 01/02/2001, the Plaintiff not knowing that the SCB cheque had not been cleared and/or the defendant's breach of duty aforesaid, drew a cheque no. 191727 ('BCB cheque') for the sum of RM100,000 payable to Koperasi Kijang Mas Negeri Pahang Berhad. When the BCB cheque was duly presented to the Defendant for payment, the Defendant wrongfully and/or in breach of his duty, dishonoured the BCB cheque.

7. In the premises the Plaintiff suffered loss and damage much inconvenience, including anxiety and nervous shock.

8. Further/and in the alternative, the Defendant had falsely and maliciously wrote on the BCB cheque of and concerning the Plaintiff the words 'Refer to drawer' ('defamatory words') and published the defamatory words to:

(a) Koperasi Kijang Mas Negeri Pahang Berhad;

(b) Other parties to whom the Defendant has published the cheque and has yet to be ascertained as at the date of this statement of claim.

9. … [Further averments on defamation.]

10. By reason of the premises the Plaintiff has also suffered serious injuries in his credit and reputation and in his business and has suffered loss and damage as a result thereof.

11. … [Claim for aggravated and exemplary damages.]

12. In the premises, the Plaintiff claims:

(a) damages under paragraphs 1-7 hereof and interest thereon at the rate of 8% per annum or such other rate this Court deems just from 06/04/2001 or such other date as this Court deems fit, to the date of full realization;

(b) damages under paragraphs 8-11 hereof (including aggravated damages) and interest thereon at the rate of 8% per annum or such other rate this Court deems just from 06/04/2001 or such other date as this Court deems fit, to the date of full realization;

(c) costs;

(d) such further or any other relief as this Court thinks reasonable and proper to grant.

[15] It can easily be gathered from the above statement of claim that the plaintiff's claim is premised on three causes of action. As to the first cause of action, the plaintiff is alleging breach of contract on the part of the defendant bank. As to the second cause of action the plaintiff is alleging negligence on the part of the defendant bank. As regards the third cause of action, the plaintiff is alleging that the defendant bank had defamed him.

[16] Since the nature of the plaintiff's claim is such, it is incumbent then upon the court to make three findings, that is: A

(1) as to whether the defendant is liable for breach of contract;

(2) as to whether the defendant is liable in negligence; and B

(3) as to whether the defendant is liable in defamation.

[17] However, in the present case, the learned judge, on the day of the hearing, after hearing submissions (without the benefit of a trial) did not make a clear finding on liability. This can be seen C from the minutes in the case file as set out above. The finding on liability was merely:

> Mahkamah: Defendant failed to give reasonable explanation for the delay. The defendant is liable. Costs for the plaintiff. Damages to be assessed by the SAR. D

[18] The learned judge merely says that the 'defendant is liable'. But the pertinent question is: liable for what? A finding of liability must relate to a cause of action. The finding cannot relate merely to an act or omission. An act or omission, although it may amount E to a wrongdoing, nonetheless is not actionable (and the doer cannot in law be held liable) unless the act or omission gives rise to a cause of action recognized by law.

[19] Hence, the following questions arise. Was the defendant F liable for breach of contract? Was the defendant liable in negligence? Or was the defendant liable in defamation? Or was the defendant liable in respect of all the three causes of action? These questions have to be asked and need to be answered, for the quantum of damages will follow the nature of the liability (or G liabilities). The legal problem is that it is not possible to carry out any assessment of damages unless one is clear as to the nature of the liability (or liabilities).

[20] It is unfortunate that in the instant case neither of the H parties appealed to the Court of Appeal against the ambiguous decision of the trial judge. It is also unfortunate that neither the counsel for the plaintiff nor the counsel for the defendant sought an appointment with the trial judge seeking clarification to ascertain the actual finding on the issue of liability. The solicitors for the I plaintiff proceeded to draw up the order, and eventualy the sealed order reads:

A ... DAN SETELAH MENDENGAR Encik Yee Teck Fah bersama Cik Ong Gek Lin, Peguam-peguam bagi Plaintif dan Encik Wong Hok Mun, Peguam bagi Defendan ADALA DIPERINTAHKAN BAHAWA penghakiman dicatatkan menyebelahi Plaintif terhadap Defendan DAN ADALAH SELANJUTNYA DIPERINTAHKAN BAHAWA Defendan
B membayar Plaintif gantirugi yang akan ditaksirkan dan kos yang akan ditaksirkan.

[21] Be that as it may, in spite of the vagueness of the judge's order on the issue of liability, the senior assistant registrar,
C however, with respect, appears unperturbed: he diligently proceeded to carry out the assessment of damages. Witnesses were called to testify and evidence recorded. At the conclusion of the trial on the assessment of damages, the registrar made the following order:

D ... DAN SETELAH ditetapkan untuk keputusan penaksiran gantirugi pada hari ini di dalam kehadiran Cik Ong Gek Lin, Peguam Plaintif dan Cik Jasvinder Kaur, Peguam Defendan ADALAH DIPERAKUI bahawa gantirugi yang ditaksirkan Menurut penghakiman bertarikh 30hb. Oktober 2002 adalah:

E (a) RM20,000 berserta faedah ke atasnya pada kadar 8% setahun dari 6 Februari 2001 sehingga tarikh penyelesaian sepenuhnya untuk kelewatan menjelaskan cek Standard Chartered Bank Berhad no. 502452 ('Cek SCB');

F (b) RM10.00 sebagai gantirugi nominal untuk cek Bumiputra-Commerce Bank Berhad no. 191727 ('Cek BCB') yang secara salah tidak dilayan;

(c) Tiada gantirugi dibenarkan untuk fitnah dan kerosakan kepada kredit dan reputasi Plaintif.
G

[22] In view of the absence of a proper finding of liability by the trial judge, the decision of the registrar on the assessment of damages must necessarily be speculative or guesswork in nature? For, with regards to his decision, the following questions arise.
H With regard to limb (a) of the senior assistant registrar's order, what was the cause of action that was assumed by him? With regard to limb (b) of the senior assistant registrar's order, again, what was the cause of action that was assumed by the registrar? As to limb (c) of his order, is the senior assistant registrar making
I a finding that the defendant is not liable in defamation? If so, can he make such a finding when that finding should have been made

by the judge and the registrar's role was merely to assess the damages? Or, was the senior assistant registrar assuming that there had been a finding (in favour of the plaintiff) made by the learned judge on the issue as to liability in defamation, and having conducted the assessment proceeding decided not to award any damages to the plaintiff? To repeat what has been said earlier in this judgment, it is not possible to carry out any assessment of damages unless one is clear as to the nature of the liability (or liabilities).

[23] In conclusion, I hold that both proceedings before the trial judge and the registrar were fundamentally flawed rendering it legally impossible for me to decide on the appeal. It would be wrong for me to embark on the realm of speculation. In my judgment, the only avenue thus opened to me under the circumstances was to invoke my inherent powers under O. 92 r. 4 to set aside the orders of both the trial judge and the registrar. With a heavy heart, I did so.

[Order of the learned judge and order of the learned senior assistant registrar set aside; parties to make preparation for case management and trial; costs in the cause.]